Filed 3/12/10 In re D.P. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.P, a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. S.V., Defendant and Appellant.	F058240 (Super. Ct. No. 07CEJ300031-1) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Mary Dolas, Commissioner.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, A.P.J., Gomes, J., and Kane, J.

S.V. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her three-year-old son, D.[1] She contends the court erred by finding D. adoptable and rejecting her claims that termination would be detrimental to him. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

D. was a medically fragile child. Born 13 weeks premature, he was hospitalized for the first five months of his life due to complications associated with his prematurity. Much of his small bowel had been surgically removed because it had died (necrotizing enterocolitis), leaving him with "short gut syndrome." As a result, D. initially received nutrition by intravenous (IV) feeding and a gastrostomy tube (GT). He had been weaned from the IV feeding by the time of his hospital discharge but continued to receive most of his nutrition through the GT. He needed constant care and supervision.

In February 2007, mother left then 10-month-old D. unattended in his stroller to fight with a woman at a bus stop. Mother, who has a history of drug and alcohol abuse, was under the influence of alcohol. She was involuntarily committed due to her behavior while respondent Fresno County Department of Children and Family Services (department) took D. into protective custody and initiated the underlying dependency proceedings (§ 300, subd. (b).)

The Fresno County Superior Court subsequently exercised its dependency jurisdiction over D., adjudged him a juvenile dependent, and removed him from parental custody. The court also ordered reunification services for mother and the child's father.

In the first six months of services, mother made significant progress. She also regularly participated in weekly supervised visits with D. to whom she was very

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

responsive and attentive. The court continued D.'s out-of-home placement and reunification services for another six months. It also ordered unsupervised visitation.

However, in the fall of 2007, mother relapsed and had to reenter substance abuse treatment. Then, in January 2008, she gave birth to a daughter, S.

By the 12-month review of services in February 2008, mother once again made significant progress but had not ameliorated the problems necessitating D.'s removal. Anticipating she would complete all court-ordered services by the 18-month stage, the court continued reunification efforts. It also granted the department discretion to arrange liberal visitation between mother and D. A 14-day liberal visit first occurred in May 2008. However, the following month the liberal visit was restricted to one week apparently following the father's relapse.

The court ordered the department to place D. with mother subject to family maintenance services at a July 28, 2008, 18-month review hearing. A mere eight days later, however, a virtual replay of the circumstances which necessitated D.'s original removal occurred.

A police officer on August 5, 2008, was dispatched to a bus stop after an anonymous caller stated mother was drinking alcohol and asked the caller if she would take her children because she could no longer care for them. Mother was clearly intoxicated and registered a reading of 0.11 on the breathalyzer. In addition, mother at one point picked up then six-month-old S. and yelled, "'Here take them if that is what you want.'" Mother was arrested and charged with felony child endangerment, public intoxication and resisting arrest.

As a result, the department took D. and his sister S. into protective custody. It initiated dependency proceedings for the sister and filed a supplemental petition (§ 387) as to D. The department alleged and the court later found true that family maintenance had not been effective in protecting D. because, despite 18 months of reunification

services, mother relapsed and was intoxicated while caring for D. The court also exercised its dependency jurisdiction over S.

Meanwhile, the department placed D. with a paternal relative and the child made an easy transition. He was very happy. This was D.'s third out-of-home placement. After two months' time, the department placed S. in the same home. D. had a difficult time adjusting to S.'s presence in the home. He was adamant about not wanting S. to sleep in his room or live in the home. As a result, he exhibited behavioral issues, including some temper tantrums.

D. also displayed resistance to mother during some supervised visits although he appeared happy to see his father. Overall, a social worker described visits as "going very well." There appeared to be a close and loving relationship between the parents and the children.

However, the parents did not always use good judgment at visits. D. was on a very restrictive diet due to his short gut syndrome. Nonetheless and despite knowing the consequences of giving D. food his body could not tolerate, the parents gave him Cheetos and cake to eat during a November visit. They needlessly caused D. to suffer a great deal of pain throughout the following day.

In February 2009, the juvenile court terminated reunification services as to D. and set a section 366.26 hearing to select and implement a permanent plan for him. It also ordered supervised, once-a-week visits between D. and his parents. As for S., the court found the parents made significant efforts and ordered the department to provide them reunification services as to her.

Mother challenged the court's setting order by way of writ petition. In an unpublished opinion, this court rejected her argument that additional reunification services and eventual reunification with her was in D.'s best interest and denied her petition. (*S.V. v. Superior Court* (Apr. 30, 2009, F057041) [nonpub. opn.].)

In May 2009, the court suspended visitation between D. and his parents. The court changed its previous visitation order following the parents' failure to comply with the court's order for random drug testing. In addition, the court had been informed since visits were limited to once-a-week, D.'s behavior was "much improved." He continued to act out and behave aggressively for a day or more after visiting his parents. By contrast, on weeks he missed visits, there was a "significant improvement" in his behavior. He also did not show any signs of distress when he missed a visit or when his sister was picked up for a visit and he stayed behind. The court limited future visits to one hour a month once the parents submitted three consecutive and negative random drug tests.

In advance of the originally-scheduled section 366.26 hearing, the department submitted a report in which it recommended the court find D. adoptable and terminate parental rights. The department had identified the paternal relative who had placement of both D. and his sister as D.'s prospective parent.

On the May 2009 date originally set for the section 366.26 hearing, mother requested a contested hearing. Then, within a matter of weeks, the paternal relative asked that the children be removed from her home. The parents were reportedly harassing the paternal relative. They apparently expected her to bring them the children whenever the parents wished to see the children despite the court's limited visitation order. She determined she could no longer provide a permanent home for D. as long as the parents were still receiving reunification services for their daughter. Her reasons for requesting the children's removal had nothing to do with the children.

As a result, in June 2009, the department removed the children and placed them with a foster family, identified as D.'s potential adoptive parents. The department also prepared an addendum to its original report in which it continued to recommend the court find D. adoptable and order termination of parental rights.

Meanwhile, trial counsel on mother's behalf submitted a "STATEMENT OF ISSUES" in which mother claimed D. was not generally adoptable because he had been medically fragile since birth and required extensive special care. She also raised whether termination would be detrimental to D. because allegedly he would benefit from a continuing relationship with her (§ 366.26, subd. (c)(1)(B)(i)) and termination would substantially interfere with D.'s sibling relationship (§ 366.26, subd. (c)(1)(B)(v)).

The court eventually conducted its section 366.26 hearing for D. in July 2009. The department submitted its case on its original and addendum reports. Its recommendations had not changed.

Mother testified on her own behalf. She described her interaction with D. during visits as very loving and playful. He viewed her as his mother and became excited as well as very happy to see her. Mother would love for D. to be home with her but she knew that was probably impossible. She hoped he would be successful and in a loving environment. She hoped her role in his future was to be his mother. She "want[ed] him back."

During the majority of mother's visits with D., his sister S. was also present. From what mother observed, the relationship between D. and S. was good. Mother could not tell, however, if D. was emotionally close to S. D. recognized S. as his sister. If mother told him to "'give sister a kiss'" D. would do so. D. did not talk to mother about his sister during any of the visits. He also did not play with his sister any of the games mother brought to visits.

When asked if D. still had special medical needs, mother replied "'No. Actually, he's overc[o]me those obstacles."

Mother's counsel also called Charlene McCune, the social worker practitioner who assessed D. for permanency planning purpose and prepared the two reports for the

hearing. In addition to her bachelor's degree in psychology and master's degree in social work, McCune had additional training in attachment assessments.

In the course of her assessment, McCune spent eight to ten hours observing D. and his sister together. The two children lived together for nine months out of D.'s over three years of life. According to McCune, a continued relationship with his sister would be in D.'s best interest. However, she did not believe D. would be greatly harmed if the court ordered adoption for him. In conducting her assessment, she considered the possibility there might not any contact between the siblings depending on what the permanent plan for each child may be. Because D. had been moved around quite a bit in his young life, he needed a stable home with permanent caregivers. That was more important to him than his relationship with his sister.

On the subject of visits with the parents, S. saw her parents much more often than D. did but he did not seem to have any problem with that. McCune also testified D. was "not usually" excited to see his mother. There did appear, however, to be a close and loving relationship between the parents and the children.

McCune further testified that D. was generally adoptable. He did not have any significant medical issues. Once a year he was checked out by the G.I. clinic due to his short gut syndrome. She also cited D.'s age of three and the fact that he was "just really happy."

Although D. had only been placed with the current care providers "not quite a month," he seemed to fit in with them very well. He was doing very well in their home.

In her addendum report, McCune wrote D.'s current caregivers were selected from among several families who were interested in adopting him. His caregivers were matched with D. based on their ability to meet his needs as well as their willingness to establish a working relationship with the biological family. Her assessment of their eligibility and commitment to adopting D. was also favorable. They previously adopted a

child and recently completed a new adoption homestudy in order to adopt again. Should mother be unable to reunify with S., the couple was willing to adopt her as well as D.

In closing argument, mother's trial counsel mentioned he had raised three issues in his issue statement. Although one was that D. was not generally adoptable due to his medical condition, counsel acknowledged it appeared D.'s medical condition appeared to have been corrected. Counsel then went on to argue the two exceptions he had raised to the Department's adoption recommendation.

Following closing arguments, the court took the matter under submission and continued the case for two weeks. On the continued hearing date, the court found it was likely D. would be adopted and terminated parental rights. In addition, it found there was insufficient evidence to show there would be a substantial interference with D.'s sibling relationship because there was insufficient evidence whether D. was raised with his sibling in the same home, whether they shared significant common experiences or had existing close and strong bonds. The court also mentioned its concern about the prior disruptions in D.'s life while noting he was doing well and beginning to stabilize. This coupled with the child's need for stability and no further disruption in his life outweighed any relationship D. had with his parents.

DISCUSSION

I. D. WAS LIKELY TO BE ADOPTED

Mother contends even though D.'s medical condition had significantly improved, his health had not progressed to a state that he could be considered generally adoptable. She adds he was exhibiting behavior problems that would present a challenge to many potential adoptive parents. In addition, she argues to find D. specifically adoptable by his current caregivers was premature because he had lived with them for a little over a month before the termination order. She therefore claims there was insufficient evidence to

support the court's adoptability finding. As discussed below, we disagree with each of her assertions.

Before a court may terminate parental rights, it must find by clear and convincing evidence that it is likely the dependent child will be adopted. (§ 366.26, subd. (c)(1).) The adoptability question focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent "waiting in the wings." (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11; see also § 366.26, subd. (c)(1).)

Regardless of who might adopt him, the undisputed trial testimony was that D. was likely to be adopted due to his young age, lack of any significant medical issues, and "really happy" nature. In social worker McCune's written reports, she added D. was able to form positive attachments and his behaviors were generally stable and could be best managed in a structured, predictable environment. He was an intelligent, engaging and beautiful child who learned quickly and was developmentally on target. He was currently in preschool and was described by his teachers as a joy to have in class. In her addendum report, McCune added her opinion that "D[.] currently ha[d] no issues that would make it difficult to find an adoptive home for him."

To the extent mother challenges the state of her son's health, we remind her of her own testimony, as well as her trial counsel's concession, that D. had no special medical needs and had overcome "those obstacles." In addition, according to the reports, D. currently had no medical issues other than mild asthma, characterized as a common issue with children who live in the Central Valley. Regarding his short gut syndrome, doctors had removed his GT a year earlier and D. was eating normally and doing well. His only special medical need in this regard was a low-sugar diet. D. was expected to be

discharged from gastrointestinal medical care after an upcoming appointment in August 2009.

As for D.'s behavior, there was evidence, as mother notes, that three-year-old D. demonstrated temper tantrums during which he cried, kicked the walls, and threw things. However, she also fails to mention his behaviors generally worsened for a day or so after visiting his parents or when there were unexpected changes in his routine or environment. In addition, mother overlooks the evidence that D. was scheduled to participate in a psychological evaluation in April 2009, the results of which would be shared in discovery. If mother seriously believed D. had psychological problems preventing him from being adopted, we observe that she never raised the issue after the psychological evaluation was to have been conducted. Also, there had been no behavioral issues since D. had been placed in his new foster home.

This brings us to D.'s recent placement change. It was undisputed that it had nothing to do with D. or his sister for that matter. His current caregivers were selected from among several families interested in adopting him. His caregivers were matched with D. based on their ability to meet his needs as well as their willingness to establish a working relationship with the biological family. To mother's arguments that the court prematurely selected adoption as D.'s permanent plan, we are not persuaded in that it was neither necessary D. be in a potential adoptive home nor there be a proposed adoptive parent "waiting in the wings" in order for the court to find him adoptable. (*In re Jennilee T., supra,* 3 Cal.App.4th at p. 223, fn. 11.)

On this record, we conclude there was substantial evidence to support the court's finding that it was likely D. would be adopted.

II. EXCEPTIONAL CIRCUMSTANCES DID NOT EXIST TO RENDER TERMINATION DETRIMENTAL IN D.'S CASE

Mother contends D. would benefit more from a continued relationship with her or an ongoing relationship with his sister than from adoption. Therefore, in her view, there was insufficient evidence to support the court's contrary findings. As discussed below, we disagree. Mother erroneously attempts to alter the requirements of section 366.26 and shift the burden of proof while ignoring the lack of any affirmative showing that termination would be detrimental to D.

Section 366.26, subdivision (c)(1)(B) acknowledges termination may be detrimental to a dependent child under specifically-designated and compelling circumstances. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) One of those circumstances is when a parent has maintained regular visitation and contact and the child would benefit from continuing the relationship to such a degree that the child would be greatly harmed by termination. (§ 366.26, subd. (c)(1)(B)(i); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; "beneficial relationship exception.") Another of those exceptional circumstances is where termination would cause a substantial interference with the sibling relationship. If so, the trial court must consider the nature of the sibling relationship and to go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. (§ 366.26, subd. (c)(1)(B)(v); see *In re L.Y.L* (2002) 101 Cal.App.4th 942, 949; "sibling relationship exception.")

A finding that termination would not be detrimental to a child, however, is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The statutory presumption is that termination and permanency through adoption is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) A party opposed to

termination bears the burden of showing that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Consequently, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim. The issue for the reviewing court is instead whether the court abused its discretion. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) For this to happen, the proof offered would have to be so undisputed that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570–571; *In re I.W. et al.* (2009) 180 Cal.App.4th 1517, 1528.) Thus, we reject outright mother's claims that there was insufficient evidence to support findings that termination would not be detrimental to D. To the extent she contends the record entitled her to a finding of detriment, we conclude based on our review of the record that the court did not err in rejecting either of mother's claims.

A. Beneficial Relationship Exception

Courts examine the beneficial-relationship exception on a case-by-case basis, taking into account the many variables which affect a parent/child bond. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.) "The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Ibid.*)

For the exception to apply, however, requires that

> "the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.*[, *supra*,] 27 Cal.App.4th [at p.] 575.) A juvenile court must therefore: 'balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family

> would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)

In this case, there was no evidence that D. would benefit from continuing the relationship to such a degree that it would outweigh the benefit to him of being adopted. For the most part, mother did maintain regular visitation with D. over the course of his dependency. There was also evidence D. knew mother, enjoyed visitation, and was loving and affectionate. Mother's evidence, however, was not undisputed and in any event was not sufficient to compel a finding in her favor. Because contact between parent and child generally confers some benefit on a child, the parent must demonstrate more than pleasant visits or frequent and loving contact. (*In re L.Y.L., supra,* 101 Cal.App.4th 942, 953-954.)

There was simply no evidence that D. would be greatly harmed if he could no longer see mother. (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)

B. Sibling Relationship Exception

Section 366.26, subdivision (c)(1)(B)(v) provides that a court may find termination would be detrimental to a dependent child if:

> "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

In this case, the siblings were currently living together and thus there would be no interference with their relationship. Mother, however, would have us consider the possibility she might reunify with S. despite her inability to successfully reunify with D.

Setting aside the speculative nature of her argument, mother overlooks the *lack* of any affirmative showing that D. and his sister were raised together, shared significant common experiences or shared existing close and strong bonds, as required under section 366.26, subd, (c)(1)(B)(v).

In any event, the court also determined it did not find there was sufficient evidence that ongoing contact was in D.'s best interests so as to outweigh the benefit of permanency he would gain through adoption. Although there was McCune's statement that maintaining a sibling relationship was in D.'s best interest, there was no evidence ongoing contact was in D.'s best interest, including his long-term emotional interest, as compared to the benefit of legal permanence through adoption. (§ 366.26, subd. (c)(1)(B)(v).) Indeed, there was McCune's professional opinion that given D.'s previous lack of stability in his young life, his need for a stable home with permanent caregivers was more important to him than his relationship with his sister. Thus, the court did not abuse its discretion in rejecting mother's claim.

DISPOSITION

The order terminating parental rights is affirmed.